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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.
No. 1446.

MARGARET E. SNYDER, Also Known as PEG SNYDER,
Petitioner,

vs.

CHARLES HARRIS and EARL W. KIRCHHOFF,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF

For the Respondents in Opposition.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. A) is reported at 390 F. 2d 204 (8th Cir. 1968). The opinion of the United States District Court for the Eastern District of Missouri (Pet. App. B) is reported at 268 F. Supp. 701 (E. D. Mo. 1967).

JURISDICTION.

The judgment of the Court of Appeals was entered on February 27, 1968 (U. S. C. A., Proceedings, Page 3).[1] Petitioner's Petition for Rehearing, or in the Alternative, to Transfer to the Court En Banc, was denied on March 22, 1968 (U. S. C. A., Proceedings, Page 16). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED.

Whether under Rule 23 of the Federal Rules of Civil Procedure, as amended in July, 1966, aggregation of several and distinct claims is permitted for the purpose of satisfying the diversity jurisdictional amount requirement of 28 U. S. C., § 1332, where aggregation was not permitted prior to the amendment of Rule 23.

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[1] The Record of the District Court proceedings will be herein referred to as "R.", and the Record of the proceedings of the Court below, will be referred to as the U. S. C. A. proceedings.

STATEMENT.

On November 23, 1966, petitioner filed her complaint in the United States District Court for the Eastern District of Missouri against respondents and National Western Life Insurance Company (R. 1-5). Petitioner filed an amended complaint against only the respondents on March 14, 1967, as a class action pursuant to Fed. R. Civ. P. 23, as amended July 1, 1966 (R. 9-13).[2] As stated by the

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[2] Fed. R. Civ. P. 23 (a), (b), as amended provides as follows:

"(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

"(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in

District Court, "[t]he relevant part of the amended complaint alleges that the plaintiff, Margaret E. Snyder, is a citizen of the State of Arizona, and the defendants, Charles Harris and Earl W. Kirchhoff are citizens of the State of Missouri; that there is diversity of citizenship and the amount in controversy exceeds $10,000.00; that since prior to November 22, 1966, the plaintiff has been a shareholder of Missouri Fidelity/Union Trust Life Insurance Company (hereinafter referred to as Missouri Fidelity) and owns two thousand shares of said company; that the By-laws of Missouri Fidelity provide for a Board of Directors consisting of fifteen directors and that the defendants were at all times relevant to this action members of said board of directors; that at all times relevant to this action the market price of Missouri Fidelity was about $2.63 per share; that sometime prior to November 22, 1966, National Western Life Insurance Company (hereinafter referred to as National Western) submitted to the directors of Missouri Fidelity a proposal to purchase from them for $7.00 per share all of the shares of Missouri Fidelity owned by them, conditioned, however, that all directors of Missouri Fidelity, except four, resign as directors and that five nominees of National Western be elected as directors of Missouri Fidelity, and that such nominees be designated and elected as a majority of the executive committee and of the investment committee of Missouri Fidelity; that on or about November 22, 1966, National Western, pursuant to its said offer, entered into an agreement with eight of the directors of Missouri Fidelity, including the defendants herein, to pay to them and to friends and relatives of theirs $7.00 per share for

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individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

an aggregate of approximately 300,000 shares of Missouri Fidelity owned by them, and thereupon and in pursuance of such conduct said eight directors, including the defendants herein, did resign as directors of Missouri Fidelity, and nominees of National Western were designated, named and elected as directors of Missouri Fidelity and as a majority of the executive committee and of the investment committee of Missouri Fidelity; that the aforesaid conduct and acts of the said eight directors, including the defendants, were a breach of trust and a violation of their duties as directors of Missouri Fidelity, and National Western procured said resignations and therefore paid or has agreed to pay the said eight directors who resigned, including the defendants herein, and their friends and relatives, a premium of about $1,200,000.00; and that the aggregate amount paid by National Western for the said shares was approximately $1,200,000.00 in excess of the market value of said shares and was a premium paid by it to the said selling shareholders for the resignations of said directors who resigned and for the obtaining of control of the executive committee and investment committee of Missouri Fidelity.

"The amended complaint prays for judgment in the amount of $1,200,000.00, said judgment to be entered in favor of the plaintiff and the other individual shareholders (allegedly over 4,000 in number) according to their respective share holdings" (R. 9-13, 16-18). See, 268 F. Supp. 701, 701-02 (E. D. Mo. 1967).

On March 27, 1967, the respondents filed their Motion to Dismiss the amended complaint, alleging as one of their grounds "that the Court lacks jurisdiction as the amount in controversy is less than $10,000.00" (R. 15).

The District Court dismissed the amended complaint without prejudice on April 27, 1967, holding that the

Court lacked jurisdiction in that the amount in controversy did not exceed $10,000.00 (R. 16-23).[3] In arriving at this decision, the Court ruled that the petitioner could not aggregate her claim with those of others in the class, because the appellant's claim was separate and distinct from other persons in the class, and Rule 23, as amended, in no way purports to affect the jurisdiction of the Court, nor change the character of a plaintiff's right. The District Court further held that to construe Amended Rule 23, so as to confer jurisdiction would constitute a violation of Fed. R. Civ. P. 82 (R. 18-23), 268 F. Supp. 701, 702-704.

The Court of Appeals affirmed the District Court "on the basis of the District Court's soundly reasoned opinion and the opinion of the Fifth Circuit in **Alvarez v. Pan American Life Insurance Company**, 375 F. 2d 992 (5th Cir. 1967), **cert. denied**, 389 U. S. 827 (1967)." In so holding, the Court stated:

> "We are not persuaded from our study of amended Rule 23 and the Advisory Committee notes to conclude that the amendment of the Rule was designed or did in fact change the substantive law proscribing the aggregation of separate and distinct claims in a class action for purposes of conferring jurisdiction under Section 1332." 390 F. 2d 204 at 205 (8th Cir. 1968).

After the denial of a Petition for Rehearing, or in the Alternative to Transfer to the Court en Banc (U. S. C. A., Proceedings, Page 16), a petition for a writ of certiorari was docketed in this Court on May 17, 1968, as No. 1446.

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[3] Petitioner alleged in her complaint that she was the owner of 2,000 shares of stock of Missouri Fidelity; that the market price of the stock at the time of the matters complained of was approximately $2.63 per share; and that the defendants received $7.00 per share for their stock. Thus, if petitioner cannot aggregate her claims with those of the other members of the class, the amount in controversy is only $8,740.00.

ARGUMENT.

The sole question raised by petitioner is whether Fed. R. Civ. P. 23, as amended July 1, 1966, operates so as to permit the aggregation of separate and distinct claims for satisfying the jurisdictional amount. We submit that this issue tendered by petitioner does not warrant further review by this Court. This Court recently denied certiorari in **Alvarez v. Pan American Life Insurance Company,** 375 F. 2d 992 (5th Cir. 1967), **cert. denied,** 389 U. S. 827 (1967), a case raising the same question as herein presented.

In **Alvarez,** one appellant owned an insurance contract issued by appellee in the amount of $1,000.00. The Castro government expropriated appellee's assets in Cuba, and for this reason payment on the contract was refused. Said appellant's suit was based on a claim that a perseverance bonus accrued later under the contract, and was for the amount due him, and such sums as were due other Cuban Nationals holding contracts with similar bonus provisions. The class was said to include more than 5,000 such contract holders. The second appellant was the holder of an insurance contract with appellee in the amount of $5,000.00. He sought his contract rights and those of all other Cuban National policyholders similarly situated. Both actions were dismissed by the District Court for the Southern District of Florida for lack of jurisdictional amount. The Court of Appeals for the Fifth Circuit affirmed holding that new Rule 23, adopted July 1, 1966, "is of no avail as it does not abrogate the well settled principle that separate and distinct claims may not be aggregated to make the jurisdictional amount even in a class action." *Id.* at 993.

The question presented to this Court, in **Alvarez,** upon which certiorari was denied was as follows:

"Does amended F. R. Civ. P. 23 abolish distinctions that existed as to class actions, so that representatives of class may now aggregate entire class' claims for jurisdictional purposes, provided that adequate and fair representation of all parties be shown." 36 U. S. L. Week 3046 (Jul. 18, 1967).

The logic of petitioner's position is untenable in light of the history of the established doctrine of aggregation in arriving at the jurisdictional amount. That doctrine is not procedural, but rather substantive law applicable with respect to jurisdiction in the federal courts. It has ancient roots, antedating the Federal Rules of Civil Procedure. As early as 1832, the aggregation doctrine was applied by this Court as a substantive law of jurisdiction in **Oliver v. Alexander**, 31 U. S. (6 Pet.) 143 (1832).[4] As subsequently developed, the aggregation doctrine is delineated by the following statement in **Troy Bank of Troy, Ind. v. G. A. Whitehead & Co.**, 222 U. S. 39, 41 (1911):

"When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interest collectively equal the jurisdictional amount."

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[4] Before 1911, this aggregation doctrine was reiterated in many cases. See, e. g., **Stratton v. Jarvis**, 33 U. S. (8 Pet.) 4 (1834); **Rich v. Lambert**, 53 U. S. (12 How.) 347 (1851); **Shields v. Thomas**, 58 U. S. (17 How.) 3 (1854); **Seaver v. Bigelows**, 72 U. S. (5 Wall.) 208 (1867); **Ballard Paving Co. v. Mulford**, 100 U. S. (10 Otto) 147 (1879); **Russell v. Stansell**, 105 U. S. (15 Otto) 303 (1882); **Ogden City v. Armstrong**, 168 U. S. 224 (1897); **Wheless v. St. Louis**, 180 U. S. 379 (1901).

Since then, that doctrine has been preserved in numerous decisions by this Court. See, e. g., **Pinel v. Pinel**, 240 U. S. 594 (1916); **Scott v. Frazier**, 253 U. S. 243 (1920); **Lion Bonding & Surety Co. v. Karatz**, 262 U. S. 77 (1923); **Clark v. Paul Gray, Inc.**, 306 U. S. 583 (1939); **Thompson v. Gaskill**, 315 U. S. 442 (1942).

It was not until June 19, 1934, however, that the Supreme Court was given the power to enact the Federal Rules of Civil Procedure, c. 651, §§ 1, 2, 48 Stat. 1064 (1934), 28 U. S. C., § 723c (1940).

In view of this history, it is obvious that the amending of Fed. R. Civ. P. 23 could in no wise, ipso facto, change the long standing jurisdictional doctrine of aggregation. For that doctrine attaches no special significance to class actions under Rule 23, but applies in all instances where two or more parties unite in a single suit for convenience or economy. If the demands are separate and distinct, each demand must have the jurisdictional amount; if there is a single right, in which the interests are joint and undivided, aggregation is permitted. It is for this reason that under the old Rule 23, aggregation of claims to meet jurisdictional amount was permitted in "true" class actions, in which the right to be enforced was joint or common, but not in "hybrid" or "spurious" class actions in which there was no joint interest or right. 2 Barron & Holtzoff, **Federal Practice and Procedure**, § 569, pp. 321-2 (1961). See also, **Fuller v. Volk**, 351 F. 2d 323 (3d Cir. 1965); **Alfonso v. Hillsborough County Aviation Authority**, 308 F. 2d 724 (5th Cir. 1962); **Troup v. McCart**, 238 F. 2d 289 (5th Cir. 1956); **Matlaw Corp. v. War Damage Corp.**, 164 F. 2d 281 (7th Cir. 1947).

With like effect, the doctrine has been applied to cases where there is permissive joinder of two or more plaintiffs under Fed. R. Civ. P. 20; **Eagle Star Ins. Co. v. Maltes**, 313 F. 2d 778 (5th Cir. 1963); and to joint actions

prior to Rule 20, **Troy Bank of Troy, Ind. v. G. A. Whitehead,** 222 U. S. 39 (1911). Similarly, in cases involving two or more defendants the doctrine has been applied. **Sovereign Camp, Woodmen of the World v. O'Neill,** 266 U. S. 292, 295 (1924); **Fecheimer Bros. Co. v. Barnwasser,** 146 F. 2d 974 (6th Cir. 1945). It has even been applied to Fed. R. Civ. P. 17 (a), dealing with real parties in interest and to Fed. R. Civ. P. 24 dealing with intervention. **Phoenix Ins. Co. v. Woosley,** 287 F. 2d 531 (10th Cir. 1961); **United Steelworkers of America v. New Park Min. Co.,** 169 F. Supp. 107, 113-14 (D. Utah 1958), reversed on other grounds, 273 F. 2d 352 (10th Cir. 1959). Accordingly, there is nothing which suggests that this doctrine does not apply to amended Rule 23, so as to disallow aggregation in a class action where the claims are separate and distinct. **Alvarez v. Pan American Life Ins. Co.,** 375 F. 2d 992 (5th Cir. 1967); **DeLorenzo v. Fed. Deposit Ins. Corp.,** 259 F. Supp. 193, 195, n. 5 (S. D. N. Y. 1966).

Of course, the petitioner recognizes that her claim is separate and distinct from other shareholders (Pet. 8), but urges that the elimination of the distinctions between "true", "hybrid" and "spurious" has somehow changed the doctrine of aggregation with respect to her. In support thereof, she asserts that the purpose of the amendment was to provide a forum for small claimants[5] and that all the members of the class are now bound by the judgment. We believe such position is untenable. In the first place, the application of the aggregation doctrine to amended Rule 23 is entirely consonant with the purpose stated by petitioner. For if the rights to be enforced are

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[5] The Notes of the Advisory Committee on the Rules, setting forth purposes for the amended Rule 23, nowhere suggest that one of the purposes was to provide a forum for small claimants. See 28 U. S. C. A., Fed. R. Civ. P. 23 (cumulative pocket part 1967) pp. 67-68.

joint and undivided, then the small claimants can use the federal forum, provided their claims collectively satisfy the jurisdictional amount. Secondly, even if the members of the class are joined as plaintiffs under Fed. R. Civ. P. 20, or as in the case of hybrid actions under old Fed. R. Civ. P. 23 where all the members of the class were bound by the judgment, the aggregation doctrine still applies. Thus, it matters not whether Rule 23, as amended, makes the members of the class bound by the judgment; what matters is whether the character of the claims is separate and distinct.

Petitioner places great reliance on **The Gas Service Company v. Coburn**, 389 F. 2d 831 (10th Cir. 1968).[6] We submit that that case was wrongly decided. The only precedent involving federal jurisdiction in diversity class actions given as authority for the holding in **The Gas Service Co.** case is **Gibbs v. Buck**, 307 U. S. 66 (1939). In **Gibbs v. Buck**, however, this Court applied the aggregation doctrine, permitting aggregation of claims because there was a common and undivided interest in the matter in controversy. See, **Gibbs v. Buck**, 307 U. S. 66 at 74 (1939); **Buck v. Gallagher**, 307 U. S. 95, 103 (1939); Nothing within the holding of the **Gibbs** case purported to authorize the aggregation of claims in the absence of such common and undivided interest. This is borne out by the case of **Clark v. Paul Gray, Inc.**, 306 U. S 583 at 588-89 (1939), decided the same day by this Court and citing the **Gibbs** case. In **Clark v. Paul Gray, Inc.**, aggregation was not permitted to satisfy jurisdictional requirements because no joint and undivided interest of the numerous plaintiffs was shown in the subject matter of the suit. See also, **Hilliker v. Grand Lodge K. P.**, 112 F. 2d 382, 384

[6] A petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit was filed in **The Gas Service Co. v. Coburn** in this Court as No. 1455.

(6th Cir. 1940). Thus, the Tenth Circuit in **The Gas Service Company v Coburn**, has misconstrued the decision of this Court in **Gibbs v. Buck**, which decision is contrary to the holding of **The Gas Service Co.** case and in fact supports the respondents herein. Further, respondents fail to see how **Provident Tradesmens Bank & Trust Co. v. Patterson**, 390 U. S. 102 (1968) can in any way give comfort to **The Gas Service Co.** holding, as the Tenth Circuit seems to believe, since the **Provident Tradesmens Bank & Trust Co.** case dealt neither with the jurisdiction of Federal courts nor amended Rule 23. Rather the **Provident Tradesmens Bank & Trust Co.** case dealt with amended Fed. R. Civ. P. 19 as to findings of "indispensability," which is not analogous to the cause at bar or to **The Gas Service Co.** case.

At any rate, **The Gas Service Company v. Coburn** applies amended Rule 23 so as to confer jurisdiction on federal courts where prior to the amendment in similar situations there was none. As such, that case transgresses Rule 82, as amended, which provides in part:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

See **Sturgeon v. Great Lakes Steel Corp.**, 143 F. 2d 819 (6th Cir. 1944). So also, **The Gas Service Co.** case is contrary to previous decisions of this Court holding that the Supreme Court is without power under its rule making authority to enlarge or diminish the substantive rights of litigants or the jurisdiction of Federal Courts. **United States v. Sherwood**, 312 U. S. 584, 589-90 (1941); **Sibbach v. Wilson & Co.**, 312 U. S. 1, 10 (1941).

Respondents submit that this Court has carefully considered the propositions advanced by petitioner recently in **Alvarez v. Pan American Life Ins. Co.**, 375 F. 2d 992 (5th Cir. 1967), **cert. denied**, 389 U. S. 827 (1967); that

the decision of the United States Court of Appeals for the Tenth Circuit in **The Gas Service Co. v. Coburn,** 389 F. 2d 831 (10th Cir. 1968) and the proposition of petitioner advanced herein are anomalous to the settled doctrine of aggregation and violative of Fed. R. Civ. P. 82 as amended July 1, 1966, as well as cases decided by this Court; and that the decision below is in accord with the intention of Congress to limit rather than expand federal diversity jurisdiction.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit be denied.

Respectfully submitted,

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